IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO.2081 OF 2007

M.J.Pharmaceuticals Ltd., a Company)
a Company incorporated under the)
Companies Act, 1956 and having its)
Registered office at F.P.145, Ram)
Mandir Road, Vile Parle (East),)
Mumbai - 400 057.)..Petitioner.

V/s.

1. The Deputy Commissioner of)
Income-tax, Central Circle 32)
Room No.4A/15B, Ground Floor,)
Aayakar Bhavan, M.K. Marg,)
Mumbai - 400 020.)
)
2. Union of India, through the)
Secretary, Ministry of Finance,)
North Block, New Delhi -110001.)..Respondents.

Mr.P.J.Pardiwala, Advocate with A.K.Jasani for petitioner.

Mr.B.M. Chatterji, Advocate with Mrs.P.P.Bhosale anmd P.S.Sahadevan for respondents.

CORAM : F.I.REBELLO AND
J.P.DEVADHAR, JJ.

DATED : 17TH OCTOBER, 2007.

ORAL JUDGMENT (PER J.P.DEVADHAR, J.)

1. Heard. Rule. Rule, returnable forthwith. By consent of parties, the petition is taken up for final hearing.

2. This petition is filed to challenge the notice dated 27/12/2006 issued under section 148 of the Income Tax Act, 1961 (‘Act’ for short) relating to the assessment year 2003-04.

3. Return of income for the assessment year in question was filed by the petitioner (‘assessee’ for short) on 11/4/2003 declaring loss of Rs.73,11,996/-. In the profit and loss account, the assessee had made provision of Rs.2,16,01,248/- for deferred taxation. During the course of the assessment proceedings, the assessing officer called upon the assessee to show cause as to why the provision for deferred taxation amounting to Rs.2,16,01,248/- made in the profit and loss account should not be taken into account for determining the book profit under section 115 JB of the Act.

4. The assessee in its reply submitted that the provision for deferred taxation was made in accordance with the accounting standard 22 and the same cannot be taken into account for determining the book profit, because, the same is not covered by any of the clauses (a) to (f) set out in the Explanation to Section 115JB of the Act. On being satisfied with the above explanation given by the assessee, the assessing

officer passed an order under section 143 (3) of the Act without making any additions to the book profit on account of provision for deferred taxation.

5. By the impugned notice dated 27th December, 2006 the assessing officer sought to reopen the concluded assessment by recording the following reasons:-

" M/s.M.J. Pharmaceuticals Ltd.
A.Y. 2003-04.

1. In this case return of income was filed on 14/11/2003 declaring loss of Rs.7311996. Assessment was made vide order u/s.143(3) dt. 24.03.2006 and total income was assessed at Rs.10695835/- which was adjusted with the unabsorbed loss for A.Y. 2002-03. Book profit of the assessee was computed at Rs.9554873 as disclosed by the assessee. However CIT(A) vide order in Appeal No.CIT(A) /C.VIII/CC 32/IT-62/06-07 dt. 4.8.2006 had deleted an addition of Rs.10920 on account of interest on fixed deposits, addition of Rs.15788 made on account of stale cheques was restricted to Rs.10236, addition of Rs.17981123 on account of unutilized modvat had been deleted, resulting in total relief of Rs.17997595/-, and total loss of assessee company was determined at Rs.7301760/- consequent to appeal effect.

2. Subsequently it was gathered that Assessee Company had considered Rs.33074365 as Net Profit before tax. However book profit under the provisions of section 115JB had been shown at Rs.10720671 which was accepted while computing book profits u/s.115JB. Profit as per P & L account was shown at Rs.33074365 and after allowing brought forward loss / unabsorbed depreciation (which ever is less) of Rs.1918244 book profit worked out to Rs.31156121 as against Rs.9554873 disclosed by

the assessee, thus resulting in under-assessment of book profit by Rs.21601248 which is on account of provision for deferred tax. As provisions for deferred tax is nothing but provision made for making liabilities other than ascertained liabilities to which provisions of explanations seen of sec. 115JB was applicable. Thus book profits of the assessee have been under assessed by Rs.21601248/-.

3. Thus it is seen that income chargeable has been under assessed and also that excessive relief has been given for which provisions of explanation 2(c)(i) of sec. 147 are applicable.

In view of the above facts, I have reason to believe, that income chargeable to tax has escaped assessment and a proposal is submitted for kind permission and approval as per sec. 15(1) of I.T. Act. The Limitation for approval and issue of notice expires on 31.3.2008.

sd/-
(R.K.Jalali)
Dy.Commissioner of Income-tax
Central Circle-32, Mumbai.

6. The assessee objected to the reopening of the assessment inter alia by relying upon the Judgment of the I.T.A.T., Kolkata Bench in the case of **A.C.I.T. V/s. Balarampur Chini Mills Ltd.** reported in **(2007 14 SOT 372 (Kol.)**. In that case, the Tribunal had considered the very same issue of including the deferred taxation charge in the book profit for the purposes of section 115 JB(2) of the Act. However, the assessing officer by his order dated 27th August, 2007 rejected the objection raised by the petitioner without assigning any reasons. Challenging the above action of

the assessing officer, the present petition is filed.

7. Mr.Pardiwala, learned counsel appearing on behalf of the petitioner submitted that the notice issued under section 148 of the Act for reopening of the assessment as well as the order rejecting the objections are bad in law because concluded assessments can be reopened only if the assessing officer has valid reason to reopen the assessment and not mere change of opinion. In the present case, during the assessment proceedings the very same issue was raised by the assessing officer and the assessment order under section 143(3) of the Act was passed after accepting the explanation given by the petitioner and, therefore, on a mere change of opinion, it is not open to the assessing officer to reopen the concluded assessment. Mr.Pardiwala further submitted that in the absence of any decision to the contrary, the decision of the I.T.A.T. Kolkata Bench in the case of Balrampur Chini Mills Ltd. (supra) which is directly on the point is binding upon the assessing officer and, therefore, the proceedings for reopening of the assessment in contravention of the order passed by the I.T.A.T., Kolkata is liable to be quashed and set aside. In this connection, Mr.Pardiwala relied upon the Judgment of this Court in the case of **German Remedies Ltd. V/s. Deputy Commissioner of Income-tax & Ors.** reported in

285 I.T.R. 26 (Bom.).

8. Mr.Chatterji, learned counsel appearing on behalf of the revenue, on the other hand, submitted that where the assessing officer has, on the basis of the material on record has reason to believe that income chargeable to tax has escaped income, then, reopening of the assessment within four years from the end of the relevant assessment year on the basis of such material on record is justified. He submitted that the proper course for the assessee is to agitate all the contentions raised herein before the assessing officer and if the reassessment order is adverse the assessee has statutory remedy of appeal and, therefore, no case is made out for interference under Article 226 of the Constitution of India. Accordingly, Mr. Chatterji submitted that the petition is liable to be dismissed.

9. We have carefully considered the rival contentions.

10. In the present case, the question as to whether for determining ‘total income’ under section 115 JB of the Act, the book profit has to be increased by the amount of provision for deferred taxation made by the assessee in its profit and loss account was

specifically raised by the assessing officer at the time of the assessment under section 143(3) of the Act. The assessee explained that the provision for deferred taxation is made in the profit and loss account as per the accounting standards and, therefore, the book profit arrived at in the profit and loss account cannot be increased by the amount of provision for deferred taxation. Once the explanation given by the assessee is accepted and the regular assessment is made, the said assessment cannot be reopened for considering the very same issue, unless the assessing officer has some material on the basis of which he forms a prima facie opinion that the regular assessment passed by accepting the explanation given by the assessee was erroneous and consequently, income chargeable to tax has escaped assessment. From the reasons recorded by the assessing officer for reopening the assessment, it is seen that neither the explanation given by the assessee and accepted by the assessing officer is found to be erroneous nor is there any other material / information on the basis of which a prima facie opinion is formed to the effect that by not increasing the book profit with the amount of provision for deferred taxation, income chargeable to tax has escaped assessment. Thus, in the present case, the reopening of the assessment is not based on any material but merely on change of opinion without any basis. It is now well established

that reopening of the assessment based on mere change of opinion cannot be sustained.

11. Moreover, when the assessee objected to the reopening of the assessment by relying on a decision of the I.T.A.T., Kolkata Bench (supra) the assessing officer could not have brushed aside the said objection and proceed to finalise the assessment. The I.T.A.T., Kolkata Bench in the above case has considered the very same issue and held that the book profit determined by the assessee cannot be increased by the amount of provision for deferred taxation while determining 'total income' under section 115 JB of the Act. In the absence of any decision to the contrary, the assessing officer was bound by the said decision. Therefore, the assessing officer could not ignore the decision of the Kolkata Bench in the case of Balrampur Chini Mills Ltd. and continue with reassessment proceedings.

12. No doubt, Explanation 2(c) to section 147 of the Act empowers the assessing officer to reopen an assessment if he has reason to believe that excessive relief has been granted to the assessee under the Act. The belief that the income chargeable to tax has escaped assessment on account of excessive relief must be based on definite basis. As stated earlier, there is no basis for treating the provision for deferred

taxation amounts to unascertained liability covered under clause 'C' of Explanation to section 115 JB of the Act. In fact, during the course of regular assessment, the very same question was raised by the assessing officer and the explanation given by the assessee that the provision for deferred taxation cannot be treated as an unascertained liability was accepted by the assessing officer. Apart from that Kolkata Bench in the case of Balrampur Chini Mills Ltd. has taken similar view. Neither the reasons recorded while reopening the assessment nor the reasons recorded while rejecting the objections raised by the assessee indicate any reason as to why the regular assessment is wrong or the decision of the Kolkata Bench in the case of Balrampur Chini Mills Ltd. is not acceptable.

13. In these circumstances, in our opinion, in the present case, since the jurisdictional requirements for reopening of the assessment are not fulfilled, the impugned notice issued under section 148 of the Act cannot be sustained.

14. Accordingly, the petition succeeds. The impugned notice dated 27/12/2006 issued under section 148 of the Act is quashed and set aside.

15. Rule is made absolute in the above terms with

no order as to costs.

(F.I.REBELLO, J.)

(J.P.DEVADHAR, J.)